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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, *et al.*,

*Petitioners,*

—v.—

RAMON MARTINEZ-VILLAREAL,

*Respondent.*

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENT

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## TABLE OF CONTENTS


*Page*

TABLE OF AUTHORITIES . . . . . ii

INTEREST OF *AMICUS* . . . . . 1

STATEMENT OF THE CASE . . . . . 1

SUMMARY OF ARGUMENT . . . . . 2

ARGUMENT . . . . . 3

I. THE STATE'S ATTEMPT TO TURN A STATUTORY CONSTRUCTION CASE INTO A VEHICLE FOR EXPLORING THE SUSPENSION CLAUSE IS BOTH UNNECESSARY AND IMPROPER . . . . . 3

II. THE STATE'S SUSPENSION CLAUSE ARGUMENT COLLAPSES UNDER ITS OWN WEIGHT . . . . . 8

III. THIS COURT'S POWER TO ENTERTAIN A HABEAS CORPUS PETITION AS AN ORIGINAL MATTER DOES NOT DEFUSE THE SUSPENSION CLAUSE QUESTION . . . . . 24

CONCLUSION . . . . . 29

## TABLE OF AUTHORITIES


*Page*

**Cases**

*Arizona v. California*,
373 U.S. 546 (1963) . . . . . 14

*Bushell's Case*,
124 Eng. Rep. 1006 (1607) . . . . . 11

*Edelman v. Jordan*,
415 U.S. 651 (1974) . . . . . 8

*Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*,
485 U.S. 568 (1988) . . . . . 6

*Ex parte Bollman*,
8 U.S. (4 Cranch) 75 (1807) . . . . . 16, 17, 18, 26

*Ex parte Dorr*,
44 U.S. (3 How.) 103 (1845) . . . . . 20, 21

*Ex parte Yerger*,
75 U.S. 85 (1869) . . . . . 14

*Fay v. Noia*,
372 U.S. 391 (1963) . . . . . 10, 11

*Felker v. Turpin*,
__ U.S. __, 116 S.Ct. 2333 (1996) . . . . . *passim*

*Ford v. Wainwright*,
477 U.S. 399 (1986) . . . . . *passim*

*Idaho v. Coeur D'Alene Tribe*,
__ U.S. __, 117 S.Ct. 2028 (1997) . . . . . 6

*Marbury v. Madison*,
5 U.S. (1 Cranch) 137 (1803) . . . . . 17, 18





*Page*

*McCleskey v. Zant*,
499 U.S. 467 . . . . . 19

*McNally v. Hill*,
293 U.S. 131 (1934) . . . . . 11

*Ohio v. Wyandotte Chemicals Corp.*,
401 U.S. 493 (1971) . . . . . 28

*Rose v. Lundy*,
455 U.S. 509 (1982) . . . . . 19

*Rust v. Sullivan*,
500 U.S. 173 (1991) . . . . . 6

*Schlup v. Delo*,
__ U.S. __, 115 S.Ct. 851 (1995) . . . . . 19, 20

*Seminole Tribe v. Florida*,
__ U.S. __,116 S.Ct. 1114 (1996) . . . . . 6, 15

*Smith v. Yeager*,
393 U.S. 122 (1968) . . . . . 11

*South Carolina v. Regan*,
465 U.S. 367 (1984) . . . . . 14

*Teague v. Lane*,
489 U.S. 288 (1989) . . . . . 19

*Textile Workers Union v. Lincoln Mills*,
353 U.S. 448 (1957) . . . . . 15

*The Slaughter-House Cases*,
83 U.S. (16 Wall.) 36 (1873) . . . . . 21, 22

*United States ex rel. Attorney General v. Delaware & Hudson Co.*,
213 U.S. 366 (1909) . . . . . 5

**Page**

*United States v. Hayman*,
342 U.S. 205 (1952) . . . . . 11, 12, 13

*Wainwright v. Sykes*,
433 U.S. 72 (1977) . . . . . 18

**Constitutional Provisions and Statutes**

Anti-Terrorism and Effective
Death Penalty Act,

28 U.S.C. §2244(b) . . . . . 4, 25

28 U.S.C. §2244(b)(1) . . . . . *passim*

28 U.S.C. §2244(b)(2) . . . . . *passim*

28 U.S.C. §2244(b)(3) . . . . . 8, 24, 25, 26, 28

28 U.S.C. §2255 . . . . . 11

English Habeas Corpus Act of 1679,
31 Car.2, c.2 . . . . . 13

Habeas Corpus Act of 1867,
Act of Feb. 5, 1867,
c.28, §1, 14 Stat. 385 . . . . . 21

Judiciary Act of 1789,
c.20, §14, 1 Stat. 81 . . . . . 16

U.S. CONST., art. I, §9, cl.2 . . . . . *passim*

U.S. CONST., art. III, §2, cl.2 . . . . . 26

**Other Authorities**

Arkin, Marc M., "The Ghost at the
Banquet: Slavery, Federalism, and
Habeas Corpus for State Prisoners,"
70 Tulane L.Rev. 1 (1995) . . . . . 12



**Page**

Baker, J.H.,
AN INTRODUCTION TO ENGLISH
LEGAL HISTORY (2d ed. 1979) . . . . . 12

Collings, Jr., Rex A., " Habeas
Corpus for Convicts -- Constitutional
Right or Legislative Grace?,"
40 Calif.L.Rev. 335 (1952) . . . . . 7

Crosskey, W.W.,
POLITICS AND THE CONSTITUTION
IN THE HISTORY OF THE UNITED
STATES (1953) . . . . . 22

Fisher, George, "The Birth of
the Prison Retold,"
104 Yale L.J. 1235 (1995) . . . . . 12

Paschal, Francis, "The Constitution
and Habeas Corpus,"
1970 Duke L.J. 605 . . . . . 18, 21

Rothman, David J.,
THE DISCOVERY OF THE ASYLUM:
SOCIAL ORDER AND DISORDER IN
THE NEW REPUBLIC (1971) . . . . . 12

## INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in many of this Court's most important habeas corpus cases, including, most recently, *Felker v. Turpin*, __ U.S. __, 116 S.Ct. 2333 (1996).

## STATEMENT OF THE CASE

The respondent, Ramon Martinez-Villareal, was convicted of murder and sentenced to death. He brought this habeas petition alleging that he is now mentally incompetent and that his execution would therefore be unconstitutional under this Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986). That allegation has yet to be tested in these proceedings. Instead, the state has argued that respondent's claim cannot even be heard.

The consequence of this position, of course, is that the state may well be on the verge of executing a man who cannot constitutionally be executed based on well-established precedents that the state does not dispute. Nevertheless, the state insists that respondent's *Ford* claim must be dismissed without reaching the merits, because the Anti-Terrorism and

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Effective Death Penalty Act, 28 U.S.C. §§2244(b)(1) & (2), bars a federal district court from considering "successive" applications except under limited circumstances not present here.

The state takes this position despite the circuit court's holding that Mr. Martinez-Villareal's petition is not a successive application at all. Mr. Martinez-Villareal did file a previous petition advancing various challenges to his conviction and the *imposition* of his sentence.[2] In this action, however, he advances a *Ford* claim, which goes not to those previous judgments, but rather to the *administration* of his death sentence. In rejecting the state's characterization of Mr. Martinez-Villareal's application as "successive," the circuit court merely allowed him *one chance* to advance his *Ford* claim in the district court. *Martinez-Villareal v. Stewart*, 118 F.3d 628 (9th Cir. 1997).

Mr. Martinez-Villareal's brief concentrates on the question now squarely before this Court: whether the circuit court reached the right result as a matter of statutory construction. This brief focuses on the state's contention that, in reaching its judgment, the circuit erroneously relied on the familiar rule that courts should construe statutes to avoid constitutional questions.

## SUMMARY OF ARGUMENT

This is a straightforward statutory construction case. All that needs to be decided is whether the circuit court correctly construed §§2244(b)(1) & (2). The state nonetheless invites this Court to undertake an examination of the Suspension Clause. To do so would require the Court to revisit

[2] Mr. Martinez-Villareal's effort to raise the *Ford* claim in his first habeas petition was dismissed as premature by the district court at the state's urging.



delicate problems that have long baffled and divided students of the federal courts. The circuit court properly invoked the general rule that statutes should be construed to avoid serious constitutional problems. That was error only if no such problems exist. The state's elaborate brief not only fails to dispel doubts about the meaning of the Suspension Clause, but actually demonstrates the existence of the very problems it hopes to deny.

Although we agree with the circuit court's disposition of the statutory construction question, we disagree with its suggestion that, if §§2244(b)(1) & (2) are construed the way the state suggests, they would deprive this Court of jurisdiction to entertain Mr. Martinez-Villareal's claim as an original habeas matter. 118 F.3d at 631. In our view, this Court would have power to address Mr. Martinez-Villareal's claim in an original habeas petition, even if the district court did not. But the formal availability of that vehicle for Article III adjudication does not eliminate potential Suspension Clause questions and thus does not render erroneous the circuit court's reliance on the avoidance principle.

## ARGUMENT

### I. THE STATE'S ATTEMPT TO TURN A STATUTORY CONSTRUCTION CASE INTO A VEHICLE FOR EXPLORING THE SUSPENSION CLAUSE IS BOTH UNNECESSARY AND IMPROPER

As Mr. Martinez-Villareal demonstrates in the party brief, his petition is not "successive" by any plausible construction of the controlling statutes, including §§2244(b)(1) & (2). To the contrary, this is his *initial* opportunity to put his *Ford* claim before the federal courts. To read the habeas statutes the way the state insists they must be read, this Court must accept two startling arguments: First, the Court

must accept the state's contention that Congress has deprived a federal district court of *any* habeas authority to entertain a *Ford* claim *even once*. Second, the Court must accept the state's contention that legislation of that kind would raise no serious question under the Suspension Clause. U.S. CONST., art. I, §9, cl.2. Neither of those propositions can be sustained.[3]

Mr. Martinez-Villareal effectively refutes the state's attack on the circuit court's construction of §§2244(b)(1) & (2) and persuasively shows that the circuit court's interpretation is correct and dispositive. It is an interpretation that respects Congress' attempt in the Anti-Terrorism Act to streamline the processing of federal habeas corpus cases without converting the Act into a series of arbitrary forfeiture rules meant to frustrate access to the federal courts at every turn. Contrary to the state's argument, neither §2244 (b)(1) nor §2244(b)(2) "clearly" demonstrates that Congress has unilaterally foreclosed *Ford* claims from habeas -- without the slightest discussion or explanation.

Remarkably, the state scarcely attends to the statutory construction question at all. It simply announces that §2244(b) "specifically requires" that Mr. Martinez-Villareal's petition "be *treated as* a successive petition" -- evidently without regard to whether it actually *is* such a petition. Brief of the Petitioners at 9 (emphasis added). According to the state, the "real question" in this case is "what the Suspension Clause . . . protects." *Id.* at 7. Through this *ipse dixit*, the state has attempted to transmute this straightforward statutory construction case into a vehicle for exploring constitutional questions this Court has left open for two hundred years.

The state's constitutional argument is entirely out of place. The only issue of constitutional moment that can arise in this case is whether the circuit court properly took seriously the Suspension Clause implications of adopting the state's view of these statutes. Having done so, that court merely invoked the most familiar and settled canon of statutory construction: In the absence of clear statutory text to the contrary, a court should construe a statute in a way that avoids "grave and doubtful" constitutional issues.[4] The only constitutional question the circuit's analysis raises, therefore, is whether serious Suspension Clause issues exist.

If the state is to justify any discussion of the Suspension Clause at all, it can do so only by advancing an utterly indefensible position: that it was error for the circuit court even to consider the familiar avoidance principle because no "grave and doubtful" Suspension Clause issue could arise in this case. Initially, the state appears to acknowledge the heroic task it has set for itself. Brief of the Petitioners at 8 (recognizing that the circuit court can be faulted only if "there is no constitutional violation to avoid").[5] Yet it then

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[3] Apart from the Suspension Clause issues that the circuit court expressly noted, the state's interpretation of these statutes would raise other constitutional questions, which are also avoided by the circuit court's construction. According to the state, for example, the new amendments to §2244(b) foreclose Mr. Martinez-Villareal's claim even though it might have been heard under prior law. If that were the case, the new Act might work an arbitrary change in the law in violation of the Due Process Clause. Moreover, if the new Act were read to deny even a single opportunity to raise *Ford* claims in a federal district court, while permitting other claims to be considered, the resulting discrimination would raise additional due process issues.



[4] *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

[5] The state argues that the circuit court should not have invoked the avoidance principle without first reaching an authoritative decision that denying Mr. Martinez-Villareal his day in court would violate the Suspension Clause. Brief of the Petitioners at 19. That is not the law.

(continued...)

devotes the bulk of its brief to a strained (and unsuccessful) attempt to show that its argument is *easy*. If, indeed, the meaning of the Suspension Clause is as free from doubt as the state insists, one would think that it would take a good deal less ink to explain how that is so.

In truth, the Suspension Clause issues the state invites the Court to address in this case are anything but easy. To engage them, the Court would have to grapple with opaque constitutional text, elusive historical evidence, and the most tentative dicta in the precedents.[6] Moreover, all those difficulties would be compounded by the extraordinary implications of reaching an authoritative decision on even a single Suspension Clause issue. Not only fundamental precepts about the structure of the federal system would be at stake, but the role of the federal judiciary in safeguarding liberty of the person. This Court has never found it necessary or prudent to range so widely and deeply before, and it is implausible to propose that this case somehow demands what so many others have not.

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[5] (...continued)
This Court has said on countless occasions that courts should construe statutes to avoid wrestling with "serious constitutional problems." *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This familiar avoidance principle both minimizes the need for constitutional adjudication and vindicates the statute's probable purpose. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)(recognizing that Congress would not lightly enact a statute that raises constitutional difficulties). Neither of those justifying rationales would be served if a court were required actually to reach a constitutional decision before construing a statute to avoid the need for any such decision.

[6] These questions rival in their complexity other constitutional questions touching the federal judiciary that have divided the Court of late. *E.g.*, *Idaho v. Coeur D'Alene Tribe*, __ U.S. __, 117 S.Ct. 2028 (1997)(involving Eleventh Amendment issues); *Seminole Tribe v. Florida*, __ U.S. __,116 S.Ct. 1114 (1996)(same).



The one thing that *is* clear from history and precedent is that the Suspension Clause, like Article III, contributes to a generalized understanding of the role of the federal judiciary within the constitutional framework. The Suspension Clause attaches special significance to cases in which individuals claim they are deprived of their physical liberty in violation of federal law and counsels a healthy suspicion of any argument that the federal courts are without power to entertain such claims. Advocates may toss off cavalier statements that Congress might simply eliminate federal habeas for state prisoners.[7] But Congress itself is far more respectful of the federal courts' longstanding responsibility for liberty of the person in this democracy.

The state itself recognizes that neither the text of the Suspension Clause nor its known and retrievable history throw significant light on its meaning. Brief of the Petitioners at 7 (acknowledging that the Suspension Clause "contains no internal definitions"). In the main, the state simply takes the paucity of probative sources to indicate, evidently by negative inference, that the Suspension Clause means very little. *Id.* at 26-27 (relying on what the surviving records are said *not* to establish). That does not follow. Thin source materials make the interpretive exercise *difficult* and the results *doubtful*. The state thus defeats its own purposes. It concedes the very things it must refute.

Stripped of its conclusory rhetoric, the state's brief is little more than a collection of selected dicta from some of this Court's decisions over the years and a virtual download from a law review article prepared by a former Justice Department lawyer nearly a half century ago.[8] That will not

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[7] *E.g.*, Brief *Amicus Curiae* of the Criminal Justice Legal Foundation at 9.

[8] Rex A. Collings, Jr., "Habeas Corpus for Convicts -- Constitutional (continued...)

do. *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974)(explaining that decisions and opinions that do not face and squarely resolve issues cannot serve as authoritative precedents on those issues). There is much more to say about (and for) the Suspension Clause as a source of federal judicial authority to safeguard liberty of the person.

## II. THE STATE'S SUSPENSION CLAUSE ARGUMENT COLLAPSES UNDER ITS OWN WEIGHT

Bearing in mind that the only question is whether "grave and doubtful" constitutional issues exist in the background of this case, the state scarcely speaks to the point at all. By contrast, the state is forced (or rather forces itself) to argue a whole series of Suspension Clause propositions -- thereby demonstrating that those propositions are quite contestable and, accordingly, that "grave and doubtful" constitutional questions *do* exist. We count ten arguments and take them roughly in the order in which the state presents them in its brief.

1. The state contends that this Court decided in *Felker v. Turpin*, 116 S.Ct. 2333, that §§2244(b)(1) and (2) can foreclose Mr. Martinez-Villareal's claim without violating the Suspension Clause. Brief of the Petitioners at 19-20. That is scarcely true. *Felker* decided only the narrow question whether a different provision of the new Act, §2244(b)(3), eliminates this Court's authority to issue the writ of habeas corpus as an original manner. The Court mentioned the Act's "new restrictions on successive petitions" and said that they do not suspend the writ. But that dictum hardly

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[8] (...continued)
Right or Legislative Grace?," 40 Calif.L.Rev. 335 (1952).



helps the state here. This is not a successive petition case. Even if it were, *Felker* approved (at the very most) "new restrictions" on successive petitions only insofar as they constitute a "modified" version of the "abuse of the writ" doctrine -- the very understanding of §§2244(b)(1) and (2) that the state rejects. Brief of the Petitioners at 11 (insisting that these new provisions replace "the whole amorphous concept of other abuse of the writ").

2. The state argues that the Suspension Clause guarantees only the writ of habeas corpus as it existed in 1789. Brief of the Petitioners at 21-22. However, even the state concedes that this point is "still open." *Id.* at 21. The best the state can do is to speculate that "when the question is squarely put, it will be only the 1789 form of the writ which will be found protected." *Id.* at 21-22. This, despite this Court's recent statement in *Felker* that, for purposes of that decision, it would assume that "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Felker*, 116 S.Ct. at 2340. The state thus appears to forget that it is supposed to be showing that there *are* no "open" Suspension Clause questions to be concerned about in this case.

3. The state contends that *if* the writ enshrined in the Suspension Clause is the writ that existed in 1789, that conclusion somehow "means" that the scope of the writ is "quite narrow" and that Congress is thus free (if it wishes) to exclude Mr. Martinez-Villareal's claim entirely. Brief of the Petitioners at 23. The state admits that the Suspension Clause itself fails to provide a "definition" for its "critical terms" but then declares that it "must be *assumed*" that "the Framers" meant "some commonly recognized fund of meaning." *Id.* at 23 (emphasis added). Next, of course, the state purports to know what that meaning was. Here again, the state apparently mistakes the burden it must carry. The state

is not free to *assume* anything, to speculate, or even to advance a persuasive argument regarding a contestable issue. It can claim that the circuit court acted improperly by invoking the avoidance doctrine only if it establishes that there are no issues to contest. That must be done on the basis of solid proof, not negative inferences from the *absence* of proof.

4. The state contends that the Suspension Clause incorporated the writ as it was at common law and that, at common law, the writ was available only to challenge executive detention before trial. Accordingly, the state argues, the Suspension Clause has no bearing on a district court's jurisdiction to entertain Mr. Martinez-Villareal's *Ford* claim. *Id.* at 24-25. The state's argument on this point (and it *is* only an argument) fails for any of four reasons: first, it fails to recognize that Mr. Martinez-Villareal's *Ford* claim is not a collateral attack on his conviction or sentence at all; second, it is inconsistent with precedent; third, it misapprehends the scope of the common law writ; and, fourth, it disregards the development of the federal writ since 1787.

a. *The Ford Claim.* As Mr. Martinez-Villareal explains in his brief, the habeas petition now under consideration challenges the state's proposed administration of his death sentence, not the conviction on which that sentence was based or, indeed, the original imposition of that sentence. Accordingly, the state's extensive argument about habeas as a vehicle for collaterally challenging criminal convictions misses the point entirely.

b. *Precedent.* In any event, this Court squarely rejected the state's argument more than thirty years ago in *Fay v. Noia*, 372 U.S. 391, 403 (1963): "[I]t is not true that at common law habeas corpus was exclusively designed as a remedy for executive detentions; it was early used by the great common-law courts to effect the release of persons detained by order of inferior courts."[9]



If, as the state contends, the Suspension Clause has no bearing on cases in which sentenced prisoners seek habeas relief, the Court's opinion in *United States v. Hayman*, 342 U.S. 205 (1952), makes no sense. In that case, the Court explained that Congress could reroute federal prisoners to the motion remedy established by 28 U.S.C. §2255 without implicating the Suspension Clause -- but only because a §2255 motion is the functional equivalent of the postconviction remedy that habeas corpus previously supplied.

c. *The Common Law Writ.* At common law, the writ of habeas corpus *cum causa* was exempt from ordinary *res judicata* principles.[10] Thus, the writ to which the Suspension Clause refers plainly extended to prisoners who had previously been before another court and had been denied their freedom. As the Court explained in *Noia*, the great English precedent, *Bushell's Case*, 124 Eng. Rep. 1006 (1607), stands for the proposition that the Court of Oyer and Terminer could entertain a habeas petition filed by petitioners who had been placed in jail by order of another court. *Noia*, 372 U.S. at 404.

d. *Developments Since 1787.* No one suggests that the common law writ known to the founding generation had the full scope of the federal writ today. But neither did that writ have a fixed purview that the Suspension Clause simply captured and cast in constitutional stone. The writ of habeas

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[9] *See also McNally v. Hill*, 293 U.S. 131, 135 (1934)(explaining that the Suspension Clause "implicitly recognize[s]" the "use of the writ" by a sentenced prisoner). The Court has abandoned *Noia's* formulation for handling procedural default in state court, but has never authoritatively disclaimed *Noia*'s assessment of this point regarding the traditional character of habeas corpus.

[10] *Smith v. Yeager*, 393 U.S. 122, 124-25 (1968).

corpus had always been a protean judicial instrument, changing with the needs of individuals for the protection of personal liberty. The Suspension Clause thus constitutionalized a dynamic remedy that would adapt itself to the future. Professor Freund made the basic point in his famous brief for the prisoner in *Hayman*: "We shall have to look to history for the essentials of the Great Writ, but not to one point in that history . . . ."[11]

If the writ was not routinely invoked by sentenced prisoners during the earliest years, there was an obvious reason. It was not until the 1830s that incarceration became a common means of sanctioning criminal offenders in this country.[12] Prior to that time, a criminal conviction and sentence initiated custody that might be challenged via habeas corpus; instead, it typically terminated pre-trial detention, rendering habeas corpus no longer necessary. Accordingly, it was not until well into the nineteenth century that there was any occasion for sentenced prisoners to file habeas corpus petitions and, consequently, any occasion to emphasize the writ's availability for that function.[13]

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[11] *United States v. Hayman*, Brief for the Respondent at 33.

[12] David J. Rothman, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 57-109 (1971); *see* J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 416-24 (2d ed. 1979); George Fisher, "The Birth of the Prison Retold," 104 Yale L.J. 1235, 1239 (1995).

[13] Marc M. Arkin, "The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners," 70 Tulane L.Rev. 1, 10-11 & n.40 (1995). One of the state's *amici* attempts to trivialize this line of argument. Brief *Amicus Curiae* of the Criminal Justice Legal Foundation at 10-12. One need not embrace the idea of the "living Constitution" (and whatever implications are thought to flow from it) to acknowledge that the state is simply and irretrievably on contestable ground when it insists that the Suspension Clause has a fixed historical meaning that every disinterested observer will accept.



5. The state argues that the common law writ of 1789 had previously been "regularized" by the English Habeas Corpus Act of 1679. Brief of the Petitioners at 7. In this way, too, the state hopes to show that the writ was (and remains) limited to prisoners attacking executive detention without judicial approval. *Id.* at 23-25. Here again, the state offers no more than speculation, thereby highlighting the very uncertainties it hopes to dispel.

Some observers read the 1679 Act to have denied habeas to convicted prisoners and thus, in some fashion or other, to have curtailed the previous scope of the writ. But Professor Freund refuted that assessment of the 1679 Act. In fact, the 1679 Act was exclusively concerned with ensuring that prisoners under criminal charges were either brought to trial or admitted to bail. It did not cover convicted prisoners for the obvious reason that they had already been tried and thus needed no vehicle for expediting the prosecution. The 1679 Act left convicted prisoners to the common law writ, which allowed them to attack their custody after conviction and sentence.[14] The state is free to disagree, but it can scarcely propose that Professor Freund was so obviously wrong that his argument raises no serious question.

6. The state contends that the Suspension Clause merely restricts Congress' ability to curtail the writ of habeas corpus, but leaves it to Congress to decide in the first instance whether the federal courts have jurisdiction to issue the writ. Brief of the Petitioners at 29. This is circular, of course, but for present purposes it is enough that it is contestable.

By most accounts, the Suspension Clause enjoined the new Congress not to interfere with the *state* courts' authority to issue the writ of habeas corpus, except in case of grave

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[14] *United States v. Hayman*, Brief for the Respondent at 31-32.

emergency. The state insists, however, that the Suspension Clause was indifferent to the possibility that Congress might deny the same authority to any *federal* courts that Congress created. That is far from clear.

To be sure, the Suspension Clause did not obligate Congress to establish federal tribunals. But once Congress created such courts, the Suspension Clause can plausibly be read as obligating Congress to recognize their jurisdiction to issue the writ of habeas corpus. Read in this fashion, the jurisdiction of any Article III court to issue the writ stands on the same footing as this Court's power to adjudicate the cases that Article III places within this Court's original jurisdiction. In both instances, it is the Constitution itself that specifies the judicial power to be exercised.[15] Indeed, this Court has virtually said as much: "In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them." *Ex parte Yerger*, 75 U.S. 85, 95-96 (1869).

Of course, in order for the writ of habeas corpus to be available from an inferior federal court, Congress had to

[15] This Court's original jurisdiction is self-executing. *Arizona v. California*, 373 U.S. 546, 564 (1963). The Court has avoided conflicts with Congress on this point by construing statutes in a way that makes it unnecessary to examine the "doubtful" claim that Congress can withhold any part of that jurisdiction by legislative act. *E.g., California v. Arizona*, 440 U.S. 59, 65 (1979); *accord South Carolina v. Regan*, 465 U.S. 367, 395 (1984)(O'Connor, J., concurring)(reading a statute not to bar original jurisdiction because the alternative construction would raise the "grave" question whether Congress can "impose remedial limitations so jurisdictional in nature that they effectively withdraw the original jurisdiction of this Court"). It is perfectly sensible to argue that the jurisdiction of all Article III courts to issue the writ of habeas corpus is of the same nature and carries the same implications.



"ordain and establish" that court as an Article III tribunal. It is equally true that before this Court could exercise the original jurisdiction provided for in Article III, Congress had to create this body. The point of the Suspension Clause is that jurisdiction to issue the writ of habeas corpus is as much a feature of any Article III court once created as are the tenure and salary protections owed to its judges or justices. A tribunal's character as an Article III court entails certain definitional attributes, which include the power to issue this special, constitutionally grounded remedy for securing liberty of the person.[16]

If this is what the Suspension Clause means, it is not the only extra-Article III provision of the Constitution that defines and shapes the purview of federal judicial power. Article I empowers the Chief Justice to preside in the Senate when the President is tried for impeachment. And, in most circumstances, this Court has held that the Eleventh Amendment deprives the federal courts of power to entertain suits against unconsenting states. *Seminole Tribe v. Florida*, 116 S.Ct. at 1127-28.

The state's simplistic deductions from silence do not dispel counter arguments, but actually invite them. It is quite sensible to read the Suspension Clause to contribute an

[16] The state evidently relies in this connection on the syllogism that "the greater power must necessarily include the lesser." Brief of the Petitioners at 34. That "beguiling" argument works no better here than anywhere else in the law of federal courts. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 474 (1957)(Frankfurter, J., dissenting). Congress' power to decide in the first instance whether to create inferior federal courts is not, of course, a "greater" power, which somehow subsumes within it the "lesser" power to manipulate as it pleases the jurisdiction of any courts it chooses to establish. The two powers are different, and the one does not follow logically from the other. Whether any particular jurisdictional enactment comports with Article III is itself an Article III question.

additional constituent element of Article III judicial power, which exists and operates independently of the jurisdictional legislation that Congress enacts. By this different account, the Suspension Clause constitutionalizes habeas corpus in the way that the Eleventh Amendment constituticnalizes state sovereign immunity. Both the Suspension Clause and the Eleventh Amendment draw upon preexisting common law concepts and build them into the federal constitutional structure. Then, once habeas corpus and state sovereign immunity obtain constitutional status, this Court assumes the duty and responsibility for elaborating their meaning as positive constitutional law.

7. The state insists that *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), held that federal habeas jurisdiction is entirely a matter of statute. The claim is unpersuasive. The Suspension Clause must have *something* to say about federal court jurisdiction. Otherwise, Congress might absolutely deprive the Article III judiciary of any power at all to issue the writ.[17]

The Court suggested nothing of the kind in *Bollman*. Indeed, *Bollman* said precisely the opposite: "Congress must have felt, with peculiar force, the *obligation* of providing efficient means by which this great constitutional privilege should receive life and security; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." 8 U.S. at 95 (emphasis added).

In that case, the Court construed the Judiciary Act of 1789 to authorize jurisdiction of the petition as an original matter and thus had no occasion even to mention the Suspension Clause. The Court did state (unremarkably) in *Bollman* that "the power to award the writ by any of the courts of the United States must be given by written law." 8 U.S. at 94. But that "written law" could obviously be supplied by the written Constitution, as well as by a statute. The Court was perfectly clear on this point when it disclaimed any general "common law" jurisdiction "not given" *either* "by the constitution *or* by the laws of the United States," *id.* at 93 (emphasis added), and explained that the inquiry was whether "by any statute, *compatible with the constitution* . . ., the power to award a writ of *habeas corpus*, . . . ha[d] been given." *Id.* (emphasis added).

As the state points out, this Court said that its authority to issue the writ in *Bollman* was a species of appellate, rather than original, jurisdiction -- even though the petition had been filed here initially. The state apparently draws from that observation the conclusion that the Suspension Clause supplied no basis for original jurisdiction. At that point in its *Bollman* opinion, however, the Court only meant to distinguish *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the Court had previously said that Congress could not give this Court jurisdiction to issue the writ of *mandamus* as an original matter.

The Court did not squarely address the implications of the Suspension Clause in either *Bollman* or *Marbury*. There is no basis, accordingly, for imputing to the Court in those cases a conscious, authoritative decision that it had no original habeas jurisdiction pursuant to that Clause. By contrast, there is a far more likely explanation for the way in which *Bollman* deflected *Marbury*. The Court may have overlooked the constitutional basis for its original habeas jurisdiction when it decided, in *Marbury*, that it could not exercise original jurisdiction beyond the cases expressly mentioned in Article III. Then, in *Bollman*, the Court may simply have seized counsel's invitation to treat its habeas jurisdiction as appellate as a convenient means of acknowledging

[17] The state concedes that the Suspension Clause imposes some obligations on Congress. Brief of the Petitioners at 21-22.

its original habeas jurisdiction (in effect if not in form) without conceding any lapse in *Marbury*.[18]

The ultimate decision in *Bollman* did not turn on the way the Court distinguished *Marbury* or, for that matter, on whether *Marbury* was distinguishable at all. The Court examined the petition in *Bollman* on the merits. That hard judicial action may be explained just as easily, indeed much more easily, as an exercise of original habeas jurisdiction derived from the Suspension Clause. In any event, the point here is that *Bollman* raised far more questions that it answered. By asking the Court to revisit that controversial old case, the state once again demonstrates that there *are* outstanding Suspension Clause issues yet to be decided.

8. The state contends that the development of modern habeas corpus has no bearing on the scope of the Suspension Clause and, indeed, fortifies the state's claim that the availability of habeas relief is determined solely by statute. Brief of the Petitioners at 35-40. Again, this only evokes counter arguments that defeat the state's purpose to show that no such arguments exist.

This Court has repeatedly shaped the scope of the writ to better serve its role as an effective safeguard for liberty of the person, even while "the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). Plainly, the Court developed the writ of habeas corpus to keep pace with the development of individual rights that required the kind of enforcement mechanism the writ could supply. Prior to the Fourteenth Amendment, the Court shaped the writ to vindicate the rights of prisoners convicted in federal court. Thereafter, the Court retooled the writ into a vehicle for enforcing the

[18] Francis Paschal, "The Constitution and Habeas Corpus," 1970 Duke L.J. 605, 650-51.



new federal rights of prisoners convicted in state court. That effort accelerated after the Court read the Fourteenth Amendment to "incorporate" procedural safeguards for the conduct of state criminal trials.

There is an explanation for the link between the writ and the body of rights that may be violated when citizens are denied liberty of the person -- and equally for this Court's interpretive authority to tailor the one to effectuate the other. The writ of habeas corpus and the rights asserted in habeas petitions share a common constitutional anchorage. The Suspension Clause supplies the constitutional basis for issuing the writ -- both by this Court and by the lower courts. The statutes in point are not irrelevant. But the creative enterprise has been to reconcile statutory directives with judicially crafted doctrines, developed independently. There is a constitutional core to federal habeas corpus. Otherwise, this Court's precedents over nearly two hundred years are unintelligible.

The Court's procedural decisions make the same point. No one would contend that decisions like *Rose v. Lundy*,[19] *McCleskey v. Zant*,[20] *Schlup v. Delo*,[21] and *Teague v. Lane*[22] were merely constructions of the statutes that hovered in the background. Those cases, too, can best be explained if federal habeas corpus has a separate, constitutional basis in the Suspension Clause.

[19] 455 U.S. 509 (1982)(holding that "mixed" petitions should be dismissed in their entirety).

[20] 499 U.S. 467 (1991)(applying the standards developed for procedural default cases to successive petition cases).

[21] 115 S.Ct. 851 (1995)(developing standards for successive petitions attacking the validity of convictions).

[22] 489 U.S. 288 (1989)(holding that new rules of constitutional law are usually inapplicable in federal habeas).

This is the very explanation the Court offered in *Felker*. Statutes that merely orchestrate the federal courts' exercise of jurisdiction to ensure efficiency do not raise Suspension Clause problems if they promote policies that are entirely consistent with the writ's constitutional status and functions. *Felker*, 116 S.Ct. at 2340.[23] A serious Suspension Clause issue would be presented, however, if a statute were read to foreclose a claim advanced by a prisoner who has done everything he can to comply with efficiency-producing rules.

9. The state contends that the Suspension Clause is irrelevant to this case because Mr. Martinez-Villareal is in state, not federal, custody. Brief of the Petitioners at 30. This argument not only proceeds from the contestable premise that the federal courts' jurisdiction to issue the writ is wholly a creature of statute. It entirely neglects the significance of the Fourteenth Amendment for state prisoners' ability to invoke federal judicial power to safeguard liberty of the person.

It is certainly arguable that the Suspension Clause guaranteed from the very outset that habeas corpus would be available to prisoners in state custody. At that time, the national government obviously did not yet exist and thus had no prisoners who might seek their release. The Suspension Clause must have targeted state prisoners, accordingly, and barred the new government from denying their access to the writ, both in state court and in any national courts that would soon be established.[24]

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[23] *See Schlup v. Delo*, 115 S.Ct. at 875 (Scalia, J., dissenting)(referring to Congress' ability to curtail federal habeas corpus for state prisoners only "within the broad limits of the Suspension Clause).

[24] One of the state's *amici* cites *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845), for a square holding that in the absence of statutory authority, (continued...)



It is hardly surprising that state prisoners actually began to file petitions for federal habeas relief only in the nineteenth century. Prior to that, state prisoners had very few federal rights they might have tried to enforce in federal court.[25] The state asserts that state prisoners could file federal petitions only after the Habeas Corpus Act of 1867 -- as though it were that Act alone that somehow entitled them to seek relief from the federal courts. In truth, it was not the habeas corpus jurisdictional statute that Congress enacted in 1867, but the Fourteenth Amendment that Congress proposed in that same year, which made it possible for state prisoners to seek federal relief via habeas corpus -- by providing them with federal rights that could be asserted to challenge their detention.[26]

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[24] (...continued)
this Court has no jurisdiction to entertain a habeas application from a prisoner in state custody. Brief *Amicus Curiae* of the Criminal Justice Legal Foundation at 11. In *Dorr*, however, the Court did not mention the Suspension Clause and thus scarcely resolved the constitutional issue. Moreover, *Dorr* would be decided differently today. In that case, the state of Rhode Island refused to allow counsel to visit the prisoner in order to obtain his approval to petition this Court for a writ of error. Counsel then sought a writ of habeas corpus as a means of reaching his client. The Court concluded that it had no statutory jurisdiction to entertain that petition, that counsel could not seek a writ of error without his client's consent and that, accordingly, the prisoner's claim could not be heard at all. That, of course, would not be the result now. *See Ex parte Hull*, 312 U.S. 546, 547-49 (1941)(holding that state officials cannot interfere with a prisoner's access to the federal courts).

[25] Paschal, *supra* at 646-47.

[26] Alternatively, it is arguable that the Fourteenth Amendment extended federal habeas corpus to state prisoners. In *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the Court adopted a narrow interpretation of the "privileges or immunities" clause. Then, to clarify its decision, the Court offered several illustrations of previously existing rights that now (continued...)

10. Finally, the state argues that if the Constitution guarantees a federal forum for Mr. Martinez-Villareal's claim, that forum is provided by this Court on *certiorari* review of the state court's judgment. Once more, the state has lost sight of its mission. Under the avoidance doctrine, it must demonstrate that there are no serious Suspension Clause issues in this case. Instead, it offers yet another contestable assertion that only underscores *how many* constitutional questions would be implicated if the habeas statutes were construed in the way the state suggests.

In this instance, the state confuses the particular case it is supposed to be building with the different set of questions addressed in most of the academic literature about the federal courts: whether Article III guarantees a federal forum for every federal claim, whether one federal forum may be closed as long as another is open, and whether due process will permit all access to the federal courts to be cut off, provided the state courts remain available. The particular question here, however, is whether the Suspension Clause designates *a particular class* of federal-question cases for special treatment, regardless of what Article III and due process may portend for other kinds of federal-question litigation.

The state not only broaches the wrong question, but gives the wrong answer. If *certiorari* were sufficient, the Suspension Clause would have no independent meaning. It would add nothing to what Article III and due process already entail. By this different account, the Suspension Clause adds to the cases and controversies listed in Article III a single, but extraordinarily important, species of federal jurisdiction (cases in which liberty of the person is at stake), which (like this Court's original jurisdiction) is self-executing and cannot be negated by statute.

It is no answer that Mr. Martinez-Villareal may contend for his physical liberty in state court and then can seek appellate review here.[27] Those alternative adjudicatory mechanisms may satisfy the demands of Article III and due process. But they do not satisfy the Suspension Clause, if that Clause is understood to establish an independent requirement that a prisoner who advances a challenge to his physical custody is entitled to contend for his liberty in a federal district court.

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[26] (...continued)
would be available to citizens to protect them from state power. Among those was "the privilege of the writ of habeas corpus." *Id.* at 79. The Court thus acknowledged: (1) that the Constitution already guaranteed some privileges and immunities to citizens of the United States; (2) that the privilege of the writ of habeas corpus was one of them; (3) that those privileges and immunities protected citizens contesting federal governmental power; and (4) that the Fourteenth Amendment extended their operation to citizens attacking state power. In sum, the "privileges or immunities" clause extended the privilege of federal habeas corpus, previously available only to prisoners challenging detention in federal custody, to prisoners challenging custody in the hands of state authorities. Professor Crosskey took a different view. 2 W.W. Crosskey, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1130 (1953). But that only demonstrates that the matter is debatable -- which again defeats the state's attempt to show that no Suspension Clause questions lie in the background of this case.

[27] Of course, this Court does not exercise an ordinary appellate jurisdiction to correct errors below. It would compromise the Court's role as ultimate referee to expect anything of the kind.

## III. THIS COURT'S POWER TO ENTERTAIN A HABEAS CORPUS PETITION AS AN ORIGINAL MATTER DOES NOT DEFUSE THE SUSPENSION CLAUSE QUESTION

The circuit court below erroneously assumed that Suspension Clause questions would be presented in this case only if §§2244(b)(1) & (2) were read to bar both the district court and this Court from entertaining Mr. Martinez-Villareal's habeas corpus petition. The state seizes upon that assumption. Properly read, however, the Act does not affect this Court's jurisdiction. Moreover, the formal possibility of an original habeas corpus petition filed initially in this Court does not defuse potential Suspension Clause problems.

In *Felker v. Turpin*, 116 S.Ct. 2333, this Court held that the "gatekeeping" provision in the new Act, §2244(b)(3), does not foreclose a habeas corpus petition filed here as an original matter. The Court had no occasion in *Felker* to say how or whether §§2244(b)(1) & (2) might affect such an original habeas petition. The Court said only that it would be "informed" by those subsections "whether or not" the Court is actually "bound" by them. 116 S.Ct. at 2339.

Nevertheless, the circuit court below concluded that §§22441(b)(1) & (2) *are* applicable to a habeas petition filed originally in this Court. The circuit court reasoned that *Felker* found §2244(b)(3) to be inapplicable to an original petition in part because that section explicitly states that it governs petitions filed "in the district court." *Felker*, 116 S.Ct. at 2339. That, according to the circuit court, established a "signpost" indicating that §§2244(b)(1) & (2) *do* apply to an original petition in this Court, because those provisions contain no explicit statement that they, too, govern only petitions at the district court level. *Martinez-Villareal*, 118 F.3d at 632.



To reason that way is to neglect *Felker's* principal reason for reading §2244(b)(3) not to affect an original petition filed here: the absence of *affirmative* language stating as much. The circuit court below erroneously equated legislative silence with an affirmative legislative attempt to withdraw jurisdiction from this Court. By contrast, this Court stated explicitly in *Felker* that it would not read a withdrawal of jurisdiction into a statute by negative implication. *Felker*, 116 S.Ct. at 2339.

The circuit court also misread *Felker's* statement that this Court would be "informed" by the other subsections in §2244(b). The point of that statement was not to *make* any decision on the impact that §§2244(b)(1) & (2) might ultimately have on original actions, but rather to *decline* any such decision. This Court obviously takes account of any policies that Congress sponsors, in this or any field. To acknowledge that the Court is "informed" by those policies is not to render a judicial decision that a particular statute has made, or has attempted to make, a policy binding on this or any Article III court.

In particular, the Court's statement in *Felker* cannot be read to have anticipated the application of §2244(b)(1) to a case like this one. In the very next section of its opinion, the Court explained that it would be "informed" by §2244(b)'s substantive restrictions inasmuch as they embody conventional rules for discouraging an "abuse of the writ." *Id.* at 2340. A petition is "abusive" when it advances a new claim that might have been raised in a prior petition. *Schlup v. Delo*, 115 S.Ct. at 863 n.34 (1995). The circuit court explained that some prisoners might attempt to avoid §2244(b)(1) by withholding a *Ford* claim from an initial petition and raising it later in a second application. In this case, however, Mr. Martinez-Villareal made no attempt to litigate his claims piecemeal. He did not withhold his *Ford* claim from his first petition, but expressly advanced it --

only to see it postponed at the state's request.

This Court has power to entertain an original petition from Mr. Martinez-Villareal in this case for the same reason it had power to entertain such a petition in *Felker*. Congress has made no attempt to withdraw this Court's jurisdiction to do so: not in §2244(b)(3), nor in §§2244(b)(1) & (2).

In *Felker*, the preservation of this Court's jurisdiction to entertain an original habeas petition "obviate[d]" the question whether §2244(b)(3) constitutes an invalid deprivation of this Court's appellate jurisdiction in violation of Article III, §2, cl.2. *Felker*, 116 S.Ct. at 2339. *See* Brief *Amicus Curiae* of the American Civil Liberties Union, *Felker v. Turpin*.[28] The circuit court in this case suggested that the preservation of that same kind of jurisdiction would obviate the Suspension Clause issues here. *Martinez-Villareal*, 118 F.3d at 631. That does not follow.

The Court acknowledged in *Felker* that §2244(b)(3) removes this Court's jurisdiction to review a circuit panel's exercise of the "gatekeeping" function by appeal or *certiorari*. 116 S.Ct. at 2338-39. The elimination of those conventional vehicles for appellate review does not violate Article III, §2, c.2, because the Court can superintend the circuit courts in substantially the same way via its power to entertain original petitions from the same prisoners. The shift from *certiorari* to original habeas may entail some adjustments in this Court's practice, but not enough to conclude that Congress has interfered with the Court's central

[28] In *Felker*, the Court proceeded on the premise that its jurisdiction to entertain habeas corpus petitions as an original matter is a species of appellate jurisdiction. That premise is contestable. If the state has his way, the Court will have to revisit the old *Bollman* case and engage this question, too.



clude that Congress has interfered with the Court's central function as the judicial system's ultimate referee.

Here, by contrast, the preservation of this Court's power to entertain Mr. Martinez-Villareal's *Ford* claim in an original habeas action could not make up for the loss of the district court's authority to do so. That would not constitute a modest adjustment in the formal means by which this Court exercises appellate review of a circuit panel to ensure that it processes cases in conformity with applicable procedural rules. It would be a blanket suspension of a district court's ability to determine the *merits* of a claim regarding *liberty of the person*. The state's interpretation of the statutes in this case would thus raise Suspension Clause questions that the statute in *Felker* did not -- questions this Court scarcely resolved when it concluded that the statute in *Felker* did not interfere with the Court's ordinary appellate jurisdiction under Article III, §2, cl.2.

No one would propose that this Court can implement the principle in *Ford* by itself providing the kind of merits adjudication that typically occurs at the district court level. To allow that theoretical possibility to satisfy the Suspension Clause would be to elevate form over substance. An explicit constitutional provision is not an idea that commands respect only in the breach. It is positive law governing governmental institutions and, in this instance, protecting individual rights. Whatever the Suspension Clause means, it must mean something that counts in the real world for real people.

If the mere theoretical existence of this Court's original jurisdiction were enough to satisfy the Suspension Clause in this case, it would presumably be enough in a variety of cases or, indeed, in all cases. That cannot be the law. In the modern era, this Court's function is genuinely appellate in

nature.[29] Whatever this Court does it must do in reaction to what a lower court has done; whatever it cannot do in that way, it cannot hope to do at all.

This is why the Court in *Felker* did not dismiss concerns touching the Suspension Clause in the way it set aside Article III considerations in that case. Channeling review in "gatekeeping" cases into original habeas does not substantially reduce this Court's actual ability to perform its oversight function in that very limited context. Accordingly, §2244(b)(3) does not place the Court's Article III duties at risk. Channeling the merits of *Ford* claims (and potentially a host of other claims as well) into original jurisdiction would have devastating implications for liberty of the person in the United States and thus *would* present serious questions under the Suspension Clause.

[29] *See generally Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).



## CONCLUSION

For the reasons stated above, the judgment below should be affirmed. The circuit court correctly construed the relevant statutes and correctly recognized the serious constitutional issues that would be raised by the state's contrary interpretation.

Respectfully submitted,

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